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October 16, 2003

ELECTRONICALLY FILED;
Hard Copy (With Exhibits) to Follow by Mail

Ms. Marlene H. Dortch
Secretary, Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20024

**Re: Written *Ex Parte* Presentation for Filing in MB Docket 03-172, in re
the Annual Assessment of the Status of Competition in the Market for
the Delivery of Video Programming.**

Dear Secretary Dortch:

We write on behalf of RCN Corporation ("RCN"), in response to the *Ex Parte* Notice filed by Comcast Corporation ("Comcast") on October 8, 2003, wherein Comcast accuses RCN of making "reckless and irresponsible" claims. Attached hereto as Exhibits 1 through 6 are documents in support of RCN's September 26, 2003, Reply Comments in the above-captioned proceeding, establishing the factual basis for the assertions in RCN's Reply Comments referenced in Comcast's letter.

RCN is, of course, extremely pleased that Comcast has now stated for the record that it "does not have 'exclusive' rights to NESN's HDTV programming." RCN's sole motivation in bringing to the Commission's attention anti-competitive circumstances in the marketplace is, and always has been, the hope that appropriate steps will be taken to remove the lingering impediments to cable competition, of which exclusive arrangements for programming are just one. Nonetheless, RCN submits that it is disingenuous in the extreme for Comcast to assert that RCN was irresponsible to report to the Commission its inability to access NESN's HDTV programming. Comcast has frequently exercised exclusive control over essential programming in which it has an interest, and, as the

attached Exhibits amply demonstrate, RCN was given every indication that the NESN HDTV programming was no exception.

Comcast asserts in its October 8 *ex parte* that “If RCN had even bothered to inquire of NESN, it would have quickly learned that Comcast’s rights are not exclusive.” In fact, RCN did approach NESN regarding the HDTV programming, immediately after learning that NESN was launching HDTV programming on the Comcast system. NESN told RCN that it was not prepared to discuss making its HDTV programming available to RCN, and would not offer any time frame for holding such discussions. NESN’s representative told RCN’s representative, in essence, “Comcast paid for it – it’s their programming.” *See* Exhibit 1, Declaration of John Murawski, dated October 14, 2003.

While this was disappointing to RCN, it was not unexpected. RCN has long sought to access New England Cable News (“NECN”) programming controlled by Comcast in the Boston market, but Comcast has repeatedly and steadfastly enforced its exclusive rights to that programming. *See* Exhibit 2, Declaration of Robert Sheehan, dated October 14, 2003. As a result of Comcast’s position, NECN refuses to deal with RCN, notwithstanding that other cable operators in the region that are not in competition with Comcast are given access to NECN. *See* Exhibit 1.

RCN’s difficulties accessing Comcast SportsNet and other essential local and regional programming have been well documented in other FCC proceedings. *See, e.g.*, Petition of RCN Telecom Services, Inc., to Deny Application or Condition Consent, in MB Docket 02-70, dated April 29, 2002; Initial Comments of RCN Telecom Services, Inc., in CS Docket 01-290, dated Dec. 3, 2001, and proceedings and comments cited at note 25 therein.


Consistent with NESN’s refusal to deal with RCN, and Comcast’s practice with respect to NECN and sports programming in other RCN markets, Comcast’s advertising blitz in connection with the launch of the NESN HDTV programming touted the programming as being available “exclusively on Comcast digital cable.” *See* Exhibit 3, Newspaper advertisement from The Boston Globe dated September 16, 2003. The NESN press release regarding the programming quoted Comcast senior vice president Kevin Casey as saying: “NESN’s Red Sox and Bruins coverage adds tremendous value to Comcast’s HDTV lineup – available exclusively to our [Comcast’s] New England customers.” *See* Exhibit 4, NESN news release dated September 15, 2003. (Multichannel News on October 6, 2003, reported that Comcast’s spokesperson has since clarified that the word “exclusively” was used in the September 15 press release to denote that Comcast was the first pay TV distributor to sign the agreement, so “[i]t was exclusive in the sense that no one else had done that at that point in time.” *See* Exhibit 5, Multichannel News article dated October 6, 2003. In other words, Comcast now takes the position that the press release was intended to mean only that the programming was temporarily exclusively available on Comcast’s system, although no such qualifier was included.)

A newspaper article in The Boston Globe on September 14, 2003, announcing the NESN HDTV launch, described Comcast as having a "strategic alliance" with the Red Sox, and quoted Red Sox chairman Tom Werner as saying "[y]ou can't overstate how thrilled we are both at being on HD and having this partnership with Comcast." See Exhibit 6, The Boston Globe article dated September 14, 2003. Although the article also reported that "Werner indicated that others, such as Cox, Charter, Adelphia, and Time Warner, have indicated interest in carrying NESN's HD signal by the end of the year," this did not indicate to RCN that NESN would reverse its position on negotiating with RCN to carry the programming – Comcast often has allowed non-competing incumbent MSOs to carry its programming, while denying its competitors access. NECN is one such case in point. See Exhibit 1.

RCN takes very seriously its duty of candor in presenting information to the Commission, and provided in its September 26, 2003, Reply Comments the best information available to it, based on what RCN had been told by NESN and had gleaned from Comcast's own statements. The character of Comcast's behavior in this matter is evidenced by its statement in its October 8 letter that "RCN uncharacteristically refused comment of this filing when called by a trade press reporter" – *i.e.*, Comcast provided its October 8 *ex parte* filing to the trade press before filing it with the FCC, inducing the press to call RCN for comment before Comcast's accusations had been made public and before the *ex parte* letter was available for RCN's review. See Exhibit 5. RCN's lack of comment at that juncture is hardly indicative of a "pattern of reckless and irresponsible claims," but rather is an example of RCN's commitment to gathering the facts before it speaks out publicly on a topic. RCN submits that it is Comcast's assertions – not RCN's – that merit the Commission's "deep skepticism."

RCN, by its attorneys, is submitting this written *ex parte* presentation pursuant to section 1.1206(b)(1). This *ex parte* notice is being electronically filed for inclusion in the public record for the above-referenced docket, pursuant to 1.49(f) of the Commission's Rules. Please direct any questions concerning this filing to the undersigned.

Sincerely,



L. Elise Dieterich
Counsel to RCN Corporation

Attachments: Exhibits 1 - 6

cc (via e-mail): Ken Ferree
Ben Johnson
Andrew Wise
Linda Senecal
Qualex International

DECLARATION OF JOHN MURAWSKI

I, John Murawski, declare as follows:

1. Since June 15, 2000, I have been Director of Programming for RCN Corporation.
2. In my capacity as Director of Programming, I am responsible for negotiating RCN's agreements for carriage with programmers, including New England Sports Network ("NESN").
3. RCN has had an agreement with NESN for carriage of NESN's analog signal, since September of 1995. In December of 2002, in the course of renegotiating RCN's contract with NESN, we requested that NESN include in the renewal contract language that would grant RCN rights to high definition ("HD") programming that NESN might develop in the future. NESN refused RCN's request, and, further, told us that NESN had no plans to develop HD programming, due to the high cost of production and the limited market for HDTV.
4. On September 14, 2003, RCN first became aware of NESN's HD programming, when it was reported in the Boston Globe newspaper that the programming would be launched on the Comcast system the following night.
5. It is my understanding that NESN is owned and controlled by the Boston Red Sox and Boston Bruins sports franchises. When the NESN HD programming launch was announced, Red Sox chairman Tom Werner was quoted in the press as saying that the Red Sox had a "partnership" with Comcast.
6. News reports surrounding the launch of NESN's HD programming quoted Comcast senior vice president Kevin Casey as saying: "NESN's Red Sox and Bruins coverage adds tremendous value to Comcast's HDTV lineup – available exclusively to our New England customers."
7. On September 15, 2003, the day of the NESN HD programming launch, I personally contacted NESN's Vice President for Marketing, Peter Plaehn, with whom I had engaged in contract negotiations in the past. In my e-mail to Mr. Plaehn, I requested that he "please contact me ASAP to discuss how RCN can go about gaining access to the NESN HD feed." I specifically informed Mr. Plaehn that RCN "would like to make immediate plans to provide this service to our customers right away."
8. Mr. Plaehn responded by telephone that day. Although Mr. Plaehn was very cordial, he informed me that Comcast, not NESN, had essentially paid for the HD programming, in terms of undertaking the capital expense to outfit the HD production facilities and to upgrade wiring at Fenway Park (home of the Red Sox) and the Fleet Center (home of the Bruins). He said, in essence, "they paid for – it's their programming."

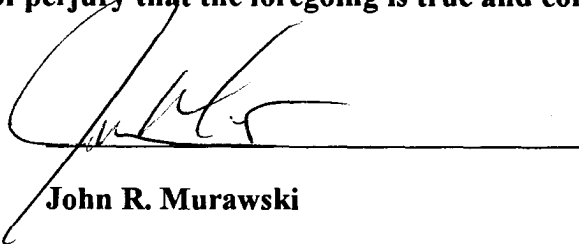
9. Mr. Plaehn took great care to inform me that NESN was "not prepared to discuss" making NESN's HD programming available to RCN, and that there was "no time frame" for the programming to be made available to us, although the Boston Globe had quoted Red Sox chairman Werner as saying that the programming would be made available to cable operators not in competition with Comcast (Cox, Charter, Adelphia and time Warner) "by the end of the year."

10. Based on this information, I concluded that Comcast had an agreement with NESN that allowed them to carry NESN's HD programming, and might allow cable operators not in competition with Comcast to carry it, but that excluded RCN from access to the NESN HD programming. I understood what NESN was telling me to mean that RCN could not purchase the HD programming, because Comcast had paid for the right to have it for themselves.

11. This information was consistent with RCN's experience with other essential regional programming in the Boston area market. Comcast has long had exclusive rights to New England Cable News ("NECN"), which prevents RCN from carrying that programming. RCN has repeatedly requested that Comcast waive its exclusive to allow NECN to sell its programming to RCN, but Comcast has refused. Significantly, and consistent with what we understood about NESN, NECN is available to other cable operators in New England, that do not compete directly with Comcast.

12. It is my understanding that local RCN management in Boston attended a meeting with NESN last week and were informed that NESN is now willing to open negotiations with RCN for carriage of NESN's HD programming. RCN is now in active negotiations with NESN, and hopes to complete a contract and commence carriage of the HD programming by the end of November of this year.

I declare under penalty of perjury that the foregoing is true and correct.



John R. Murawski

Executed on: October 15, 2003.

DECLARATION OF ROBERT SHEEHAN

I, Robert Sheehan, declare as follows:

1. Since May 1, 2000, I have been General Manager of the RCN cable system in the Boston metropolitan area market.
2. In my capacity as General Manager for RCN-BecoCom, LLC, I am responsible for interacting with my counterpart at Comcast, Comcast's senior vice president for the New England region, Kevin Casey. I believe that Mr. Casey and I have a very good business relationship.
3. Among the issues that Mr. Casey and I have discussed is Comcast's agreement with New England Cable News ("NECN"), which excludes RCN from carrying that programming.
4. In March of 2003, after meeting with Mr. Casey, he informed me that Comcast would not provide NECN "to its competitors." Mr. Casey explained Comcast's view that Comcast and its predecessors had made a significant investment in NECN, to create a "unique" programming product "for the benefit of our [Comcast's] subscribers in this region."
5. NECN and the NESN HD programming are similar, in that both represent non-reproducible, regional programming that is considered essential by many local cable subscribers. Without access to this programming, RCN's ability to compete with Comcast in the Boston area market is impaired.

I declare under penalty of perjury that the foregoing is true and correct.

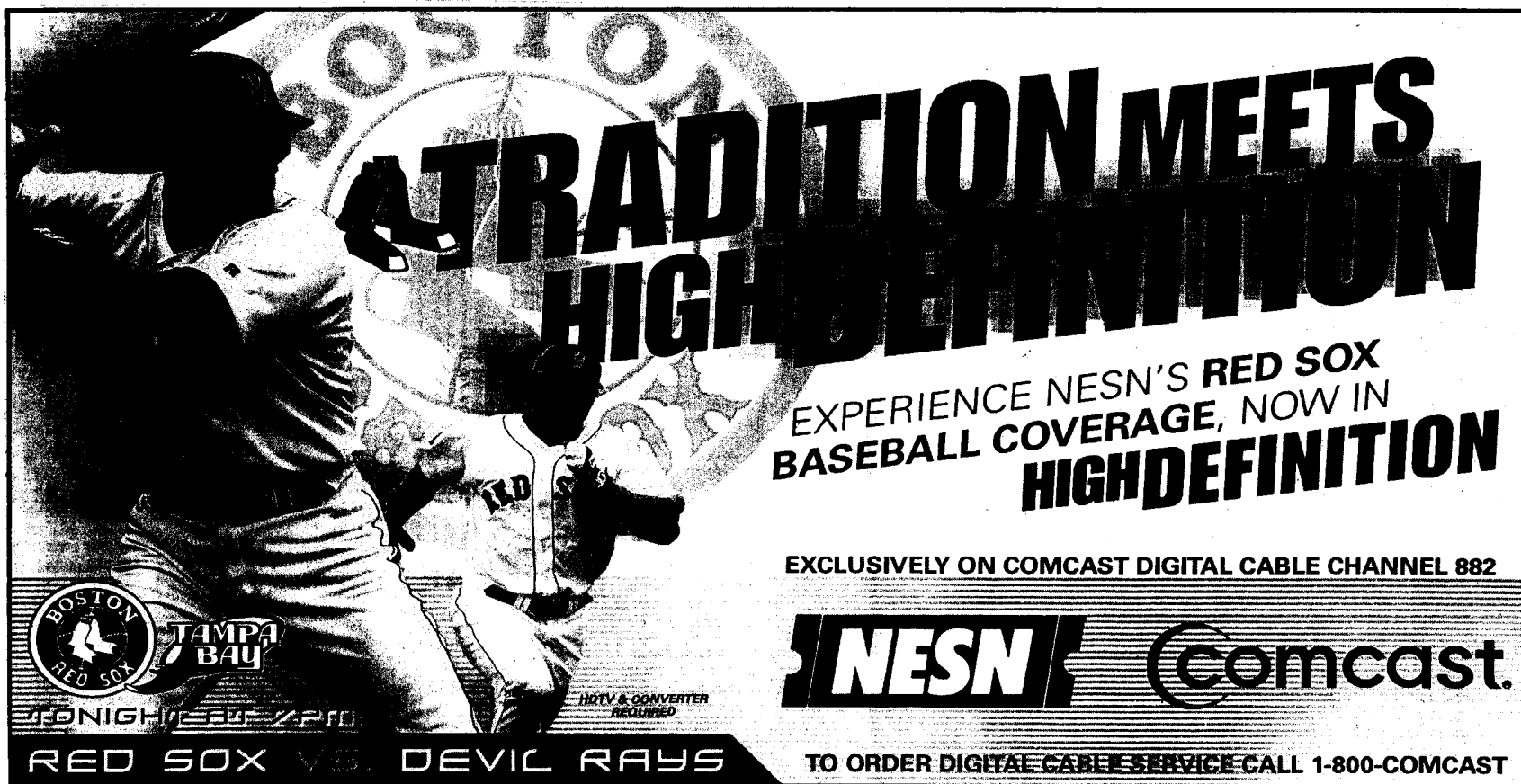


Robert Sheehan

Executed on: October 16, 2003.

TUESDAY, SEPTEMBER 16, 2003

THE BOSTON GLOBE



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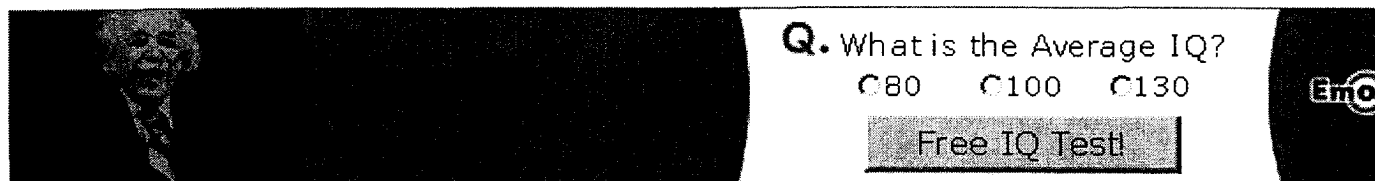
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NESN News

NESN AND COMCAST TO DELIVER HIGH-DEFINITION BROADCASTS OF RED SOX AND BRIUNS HOME GAMES

NESN's First Red Sox Home Game in HDTV on Sept. 15

BOSTON - (Sept. 15, 2003) – Boston Red Sox and Boston Bruins fans with Comcast's high-definition television service will for the first time be able to watch New England Sports Network's (NESN) award-winning game coverage in HDTV. NESN and Comcast Cable announced today that Comcast will air the remainder of the Red Sox 2003 home games and all the Bruins 2003/04 home games in HDTV.

The first Red Sox HDTV broadcast will air at 7:00 PM/ET tonight when the Sox host the Tampa Bay Devil Rays at Fenway Park. This season, Comcast will air NESN's HDTV coverage of eight Red Sox home games and thirty-six Bruins home games.

"NESN is proud to offer New England sports fans our coverage of the Red Sox and Bruins home games in high-definition," said Sean McGrail, president of NESN. "The marriage of this technology with our award-winning coverage of two of New England's favorite teams will provide our fans with the best at-home game viewing experience possible."

NESN's high-definition broadcasts will combine the highly detailed, superior picture of HD technology with the excitement of NESN's live game coverage. NESN's coverage of New England sports has been consistently recognized for its high quality, receiving at least one Emmy Award from the National Academy of Television Arts and Sciences New England Chapter in each of the last nine years.

"NESN's Red Sox and Bruins coverage adds tremendous value to Comcast's HDTV lineup – available exclusively to our New England customers," said Kevin Casey, senior vice president of Comcast's New England region. "Comcast has invested millions of dollars to upgrade New England's cable networks to offer the best in home entertainment and the most robust HDTV lineup in New England."

In addition to NESN, Comcast's HDTV lineup includes ABC, NBC, PBS, ESPN, HBO and Showtime.

HDTV is a new standard of television featuring a highly detailed picture quality with images up to six times sharper than analog television; a wide-screen picture with a width:height ratio of 16:9, identical to that of most cinema; more than two million pixels per picture and CD-quality Dolby Digital surround sound. The

NESN HIGHLIGHTS

9/24: **MLB:** Red Sox vs. Baltimore Orioles, 6:30 p.m. (HDTV)
 9/24: **Boston Globe:** Sports
 p.m.
 9/25: **MLB:** Red Sox vs. Baltimore Orioles, 6:30 p.m. (HDTV)

NESN AD CONT

LO/JAC
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service is available to Comcast Digital Cable customers who have an HDTV-ready television set and an HDTV digital cable converter. Customers should call 1-800-COMCAST or visit www.comcast-ne.com to rent a digital cable converter and schedule a professional installation by a Comcast technician.

NESN/Comcast Red Sox HDTV Game Schedule:

Mon., Sept. 15	Red Sox vs. Devil Rays	7:00 p.m.
Tue., Sept. 16	Red Sox vs. Devil Rays	7:00 p.m.
Wed., Sept. 17	Red Sox vs. Devil Rays	7:00 p.m.
Thu., Sept. 18	Red Sox vs. Devil Rays	7:00 p.m.
Mon., Sept. 22	Red Sox vs. Orioles	7:00 p.m.
Tue., Sept. 23	Red Sox vs. Orioles	7:00 p.m.
Wed., Sept. 24	Red Sox vs. Orioles	7:00 p.m.
Thu., Sept. 25	Red Sox vs. Orioles	7:00 p.m.

In Massachusetts, New Hampshire and Maine, the games will appear on channel 882. In Connecticut, the games will appear on channel 382 in the Hartford area, and channel 175 in Clinton, Groton and Middletown.

About **NESN** New England Sports Network (NESN) is a 24 hour, regional TV sports service owned by the Boston Red Sox and Boston Bruins that is delivered to over 3.8 million homes throughout the six state region. NESN delivers exclusive coverage of the Boston Red Sox, Boston Bruins, minor league baseball and hockey, local and national college football, basketball and hockey, and much more!

About Comcast Cable

Headquartered in Philadelphia, Comcast Cable is a division of Comcast Corporation, a developer, manager and operator of broadband cable networks and provider of programming content. Operating in 17 of the United States' largest metropolitan areas, Comcast is one of the leading communications, media and entertainment companies in the world. Providing basic cable, Digital Cable, high-speed Internet and telephone services, Comcast is the company to look to first for the communications products and services that connect people to what's important in their lives. The company's 55,000 employees, in six divisions, serve more than 21 million customers.

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OCTOBER 6, 2003

MULTICHANNEL NEWS

41

Comcast: RCN's Wrong on NESN

BY TED HEARN

Comcast Corp. challenged RCN Corp.'s assertion that an alleged exclusivity agreement with New England Sports Network bars RCN cable customers from seeing Boston Red Sox Major League Baseball games in HDTV.

Comcast and NESN have a distribution agreement that is less than one month old, but it is not exclusive, Comcast spokesman Tim Fitzpatrick said after *Multi-channel News* reported RCN's allegations online last Wednesday.

NESN public-relations manager Gary Roy said the HDTV deal with Comcast was nonexclusive.

The word "exclusively" was used in a Sept. 15 press release announcing the deal to denote that Comcast was the first pay TV distributor to sign the agreement, Fitzpatrick said, adding, "It was exclu-

sive in the sense that nobody else had done that at that point in time."

In a Federal Communications Commission filing Sept. 26, RCN said its customers were limited to analog access to NESN because of the HDTV agreement with Comcast.

The filing also implied the Comcast-NESN deal was particularly injurious because RCN subscribers would miss Red Sox playoff games in HDTV as the team vied for its first World Series victory since 1918.

RCN subscribers could not be cut off from Red Sox playoff games in HDTV by NESN's agreement with Comcast because NESN did not have the television rights to those games, Roy said. RCN's Boston vice president and general manager, Robert Sheehan, declined to clarify the company's FCC filing. ■

Appeared in Boston Sunday Globe – 9/14/03

NESN, Comcast are about to redefine Sox coverage

SporTVView

BILL GRIFFITH

Television is all about “WOWs.” Those are the unexpected plays or events that jump through the screen and grab the viewer, prompting a “Did you see *that*?” reaction.

One of those moments is coming tomorrow night when New England Sports Network and Comcast begin broadcasting Red Sox home games in high definition.

In addition, work is under way to upgrade wiring at the FleetCenter, and NESN plans to air all Bruins home games in the HD format as well.

“There is nothing else we could have done that would have the impact this will,” said Sean McGrail, president of NESN. “People truly will see the Red Sox and Bruins in a way they never have before. It is a major elevation of the entertainment experience.”

Comcast took over the AT&T cable franchise last winter and has already established itself as being aggressive in rolling out new products and upgrading customer service. Cable’s big competition is from satellite service providers, and Comcast recognized the value in a strategic alliance with the Red Sox, especially at this time of year, when DirecTV is wooing subscribers with its “NFL Season Ticket” package.

“I’d been thinking about this for a long time,” said McGrail. “There’s been a lot of chicken-and-egg talk in the TV industry in referring to which would come first, the increase in HD TV sales or the programming that would spur those sales. Someone had to make a major jump, and we’ve done that.”

Since July, Fenway Park very quietly has been rewired with fiber-optic cable, one production truck was refurbished (at a cost of \$4 million) and another is being built, a fiber line was run to NESN’s Needham relaying facility, and all the technical equipment was retrofitted.

In addition, “vacationing” production staffers actually were being retrained in HD production and digital editing, and games were being simulcast at the ballpark on side-by-side (standard and HD) cameras.

“We have a unique franchise, and this is a gesture to our viewing public,” said McGrail, who emphasized that the money was spent without any costs being passed on to subscribers.

“There’s no question that the tremendous expense of making the change is keeping other broadcasters from doing it, but actually it was the difficulty in obtaining the new HD equipment — receivers, recorders, up-converters — that was the hardest part of the whole changeover. We knew the price of all this would drop significantly in the next five years and we could have gotten away with waiting, but we decided to swing for the fences. We’re going to do all our games in HD, where other carriers are doing far fewer.”

McGrail said NESN “will start doing road games as soon as possible from those arenas that have

fiber-optic wiring and where mobile HD production trucks are available.”

This will put NESN in the vanguard of a small group of regional networks producing their own high-definition signals, including MSG Network in New York and Comcast Net in Philadelphia.

Red Sox chairman Tom Werner said, “You can’t overstate how thrilled we are both at being on HD and having this partnership with Comcast.”

Comcast is the team’s biggest cable carrier, but Werner indicated that others, such as Cox, Charter, Adelphia, and Time Warner, have indicated great interest in carrying NESN’s HD signal by the end of the year.

NESN HD will be available on Channel 882 on Comcast’s High Definition digital tier (the analog version of the NESN broadcast remains on its present spot on the cable dial). The addition of NESN gives Comcast an HD lineup in Boston of Channel 2, Channel 5, Channel 7, ESPN HD, HBO HD, Showtime, and NESN. In addition, starting tomorrow, a pair of

“IN HD” channels will join the tier. These are being produced by the In Demand pay-per-view people (except these aren’t at extra charge) and will offer a wide variety of sports and movies.

The only extra charge for the HD channels for Comcast digital cable subscribers is the \$2 monthly upgrade to an HD box (\$7.25 per month, compared with \$5.25 for a digital box). Comcast, with some 20,000 HD subscribers now, expects to be adding 1,000 per week through the end of the year.

Meanwhile, Comcast continues negotiating to add both Fox (Channel 25) and CBS (Channel 4) to the HD package. CBS, with 11 remaining Patriots regular-season games this season, would be a big addition, although this year the network is doing only one feature NFL game per week in HD (today’s Patriots-Eagles is in HD for fans who can get HD over the air or on DirecTV). At least three Patriots games will be seen in Boston in HD: the two ESPN night games (vs. Cowboys Nov. 16 and at Jets Dec. 20) and the ABC “Monday Night Football” game in Denver

Nov. 3.

“We had conversations on the idea back in May and finally got it together in July, working in earnest to hit a Sept. 15 target date,” said Kevin Casey, senior vice president of Comcast’s New England region. “The folks at NESN saw it as the future of sports on TV. At Comcast, we feel movies and sports bring out the best in high definition.”

Casey can see the HD TV movement finally gaining serious momentum. “We’ve spent millions upgrading our network, and now it looks as though we’re finishing just in time,” he said. “We’re starting to see affordable HD-ready TV sets, and the projections are that this will be an HD TV Christmas in the electronic stores.”

The technocrats tell us that an HD picture is six times sharper than today’s analog pictures, the color resolution is twice as good, and the accompanying audio fee is CD-quality surround sound.

Those who see Fenway in HD tomorrow evening likely will say the park never looked so good... and WOW.